

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Thomas Noska,

Complainant

v.

Grand Metropolitan, Inc.,
a Delaware Corporation, and
The Pillsbury Company,
a Delaware Corporation,

Respondents.

**ORDER GRANTING
RESPONDENT'S MOTION FOR
SUMMARY DISPOSITION**

This matter came for hearing before Administrative Law Judge Steve M. Mihalchick on July 11, 1997, on a Motion for Summary Disposition filed by the Respondent, the Pillsbury Company. William J. Egan, Rider, Bennet, Egan & Arundel, 2000 Metropolitan Centre, 333 South Seventh Street, Minneapolis, Minnesota 55402, appeared on behalf of the Pillsbury Company ("Pillsbury" or Respondent). William A. Celebreeze, Horton and Associates, 4930 West 77th Street, Suite 210, Minneapolis, Minnesota 55435-4804, appeared on behalf of Complainant, Thomas Noska. The record closed on this motion at the end of the hearing.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondent's Motion for Summary Judgment is hereby GRANTED.
2. Complainant's Complaint is hereby DISMISSED WITH PREJUDICE.

Dated: August 1, 1997.

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

MEMORANDUM

Thomas Noska alleges that he was constructively discharged from his employment with Pillsbury as a Senior Systems Analyst due to his age in violation of Minn. Stat. Chap. 363 ("Human Rights Act"). Pillsbury denies that age was the basis for any action taken regarding Noska's employment. Complainant maintains that the reasons offered by Pillsbury to explain its actions are pretextual. Pillsbury maintains that Complainant's voluntary termination of employment does not meet the standards for constructive discharge. Respondent filed a motion requesting summary disposition.

Summary disposition is the administrative equivalent of summary judgment. **Minn. R. 1400.5500 K.** Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. **Sauter v. Sauter**, 70 N.W.2d 351, 353 (Minn. 1955); **Louwagie v. Witco Chemical Corp.**, 378 N.W.2d 63, 66 (Minn. App. 1985); **Minn.R.Civ.P. 56.03**. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. **Illinois Farmers Insurance Co. v. Tapemark Co.**, 273 N.W.2d 630, 634 (Minn. 1978); **Highland Chateau v. Minnesota Department of Public Welfare**, 356 N.W. 2d 804, 808 (Minn. App. 1984).

Pillsbury, as the moving party in this case, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary disposition, the nonmoving party, Noska, must show that specific facts are in dispute which have a bearing on the outcome of the case. **Hunt v. IBM Mid America Employees**, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn.R.Civ.P. 56.05. *Id.*; **Murphy v. Country House, Inc.**, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); **Carlisle v. City of Minneapolis**, 437 N.W.2d 712, 715 (Minn. App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. **Carlisle**, 437 N.W.2d at 715 (citing **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986)). The nonmoving party also has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party. See **Celotex**, 477 U.S. at 325; **Thiele v. Stich**, 425 N.W.2d 580, 583 (Minn. 1988); **Greaton v. Enich**, 185 N.W.2d 876, 878 (Minn. 1971); **Dollander v. Rochester State Hospital**, 362 N.W.2d 386, 389 (Minn. App. 1985).

Based upon the pleadings and affidavits submitted in this matter, and construing the facts in the light most favorable to the Complainant, the underlying facts in this matter appear to be as follows.

Noska began working for Pillsbury as a contractor in April, 1989. Celebreeze Affidavit, Exhibit 1, at 16. His status changed to employee on December 1, 1989, when Noska occupied the position of Programmer Analyst. *Id.* at 16 and 20. Noska was involved in the purchase installation of the Logistics Plus software package. *Id.* at 16. Noska worked primarily with Logistics Plus from 1989 through August, 1994. *Id.* at 23. Other projects he worked on were derived from the Logistics Plus package. *Id.* at 26.

Noska's supervisor, Steve Bishop, completed an Annual Performance review for the period of December, 1989 to December, 1990. In that review, Noska was assessed to "meet expectations" in four areas and "does not meet expectations" in one area. Cheeseboro Affidavit, Exhibit 1.

In 1992, Noska was promoted to Technical Analyst. Bishop completed a Performance Appraisal of Noska on December 20, 1992. Bishop rated Noska's overall performance as 3 (fully acceptable). Bishop's summary of Noska's performance stated:

Tom's overall performance is acceptable for his current grade level. His strengths continue to be in the production support/client service, communication and interpersonal skills areas. He is also a good team player.

In the coming year, Tom needs to continue to develop his understanding of the Multilevel Forecasting system to that he can provide a high level of support to the users in this area. He also needs to continue to develop his analysis and design skills so that he can assume more leadership roles within the Sales and Operations Planning area.

Cheeseboro Affidavit, Exhibit 2, at 7.

In 1993, Noska's position was retitled as Systems Analyst. Bishop conducted a performance review in December, 1993, and characterized Noska's overall performance rating as a 4 (performance exceeds job expectations). Cheeseboro Affidavit, Exhibit 3. Bishop included the comment that "Tom has clearly demonstrated the skills and experience necessary to perform as a lead analyst." *Id.*

In 1994, Noska was promoted to Senior Systems Analyst. By March, 1994, Bishop was no longer responsible for the group including Noska. Cyndy Nelson became responsible for the group. Celebreeze Affidavit, Exhibit 2, at 35. Nelson became the MIS Manager for Pillsbury in July, 1994. *Id.* at 36. In that position Nelson was responsible for the operation and support of software for sales, purchasing, and Logistics Plus. *Id.* Nelson characterized part of her responsibility as "having teams of people in place that could provide the day-to-day support; that you were cross-trained properly; that you had the right skills to support those applications; and that we

understood the priorities and everything associated with keeping those things running.”
Id.

When Nelson became MIS Manager, she noted that the entire knowledge base of certain software packages was concentrated in one or two individuals. *Id.* at 40-41. Nelson considered this situation to be a risk to Pillsbury. *Id.* at 40. Noska and another Senior Systems Analyst, John Bell, were given new responsibilities in response to this situation. *Id.*

Nelson became Noska's supervisor in August, 1994, and she requested information on all the systems being maintained by the group. Noska believed that the information request required more time to meet than Nelson afforded. Celebreeze Affidavit, Exhibit 1, at 36. Noska believed the request was unreasonable. *Id.*

In March, 1994, Nelson informed Noska that she had selected a contractor as team leader for the group. *Id.* at 52, Exhibit 2, at 47. Team leaders were responsible for certain systems and reported to the supervisor, in this case, Nelson. *Id.* at 52-3. Nelson had worked with this contractor before becoming the group's supervisor. *Id.* Noska informed Nelson that he objected to the choice of team leader. *Id.* at 54. Noska thought that his position as Senior Systems Analyst and an employee at Pillsbury made him a better choice for team leader. *Id.* at 53-4. After two months, the contractor was replaced as team leader by Bell. *Id.* at 54.

Nelson asserted that her choice of team leader due to her experience with that contractor and her need for an immediate placement in the role. Celebreeze Affidavit, Exhibit 2, at 47. Nelson discussed with her supervisor, Jim Keeley, her plan to use a contractor as team leader instead of either of the two new Senior Program Analysts in her group. *Id.* Keeley approved Nelson's decision. *Id.*

By the fall of 1994, the group was reorganized to cross-train all staff on all the software programs within the group's responsibility. Celebreeze Affidavit, Exhibit 2 at 43. Noska began working on the Brokerage and MASCOT systems, computer programs for tracking all of Pillsbury's sales. Celebreeze Affidavit, Exhibit 1 at 38-39. Noska had problems with both the Brokerage and MASCOT systems. *Id.* at 40. There was no documentation prepared for those systems and Noska had no knowledge of how they worked. *Id.* Noska was not able to master the MASCOT system. *Id.*

Nelson conducted Noska's performance review in December, 1994. That review detailed Noska's ability to work with the Logistics Plus and Contribution Reporting System software. Cheeseboro Affidavit, Exhibit 4. The performance review also identifies difficulties that Noska was having with his new responsibilities. *Id.* Cheeseboro Affidavit, Exhibit 4. Regarding Noska's handling of MASCOT, the review included the following:

Given the complexity of some of the Sales systems, and the actual time spent on them, some of the reasons may be justified. However a number of other people have also been placed in similar situations with more

successful results. Given Tom's Senior Analyst role there is a higher expectation from him than others.

* * *

Tom's main objective for the next year should be to try to demonstrate to his co-workers the analyst abilities he possesses, and be able to provide a lead role, *within a team*. He is capable of assuming the role. Success in a number of tasks focused in these still new systems will provide a boost in confidence in his abilities, both for him and his colleagues.

Cheeseboro Affidavit, Exhibit 4 (emphasis in original).

In preparing the performance review, Nelson compared Noska's progress in mastering MASCOT to the software mastery demonstrated by Bell and Theresa Champlin, another Senior System Analyst. Celebreeze Affidavit, Exhibit 2, at 78. None of the Senior System Analysts had sufficient documentation on the software they were working with. *Id.* at 79. Nelson perceived Noska as not aggressively attacking the problems related to unfamiliar software and contrasted his performance on MASCOT against his history on Logistics Plus. *Id.* at 80. The overall ranking on his performance review was a 3 (meets expectations). Cheeseboro Affidavit, Exhibit 4.

Noska prepared a memorandum disagreeing with his performance review. Cheeseboro Affidavit, Exhibit 4. None of the problems he experienced with the software were disagreed with in the memorandum. The memorandum focused on the reasons for his continuing to have problems. *Id.* A meeting was scheduled by Noska in February, 1995, with Nelson, Bell, and Karen Coleman to discuss the review. Celebreeze Affidavit, Exhibit 1, at 101. Noska believed that he would be able to discuss what was wrong with his performance review and request a transfer. *Id.* at 102. Nelson took the opportunity to indicate where Noska needed improvement. *Id.* Nelson had considered initiating a Performance Improvement Plan (PIP) to address the concerns she had with Noska's performance. Celebreeze Affidavit, Exhibit 2, at 97-8. She decided against initiating the PIP at that time because a reorganization was imminent and there was a possibility that staffing would change. *Id.* at 98.

In March, 1995, a reorganization took place that "functionally aligned" the MIS services provided by the group. Celebreeze Affidavit, Exhibit 2, at 52. The Logistics Plus software and related programs were put under another manager. *Id.* at 39. Tom Newman became Nelson's supervisor as part of that reorganization.

On three occasions in 1995, Noska complained to Pillsbury's Human Resources department that Nelson was treating him "unfairly." Celebreeze Affidavit, Exhibit 1, at 120-22. Noska does not recall whether he ever mentioned discrimination on the basis of age in those complaints. *Id.*

Noska believed that some of the work assigned to him by Nelson could be done by a Programmer Analyst and was not appropriate for a Senior Systems Analyst. *Id.* at 65. Nelson ate lunch with Bell and Suzanne Leeke (another member of the group) on

many occasions. Noska was not asked along. *Id.* In July, 1995, Noska complained to Newman that Nelson was not treating Noska fairly. *Id.* at 70. Noska asked Newman for a transfer to again work on Logistics Plus. Celebreeze Affidavit, Exhibit 1, at 70-72. No action was taken on the request. Noska complained to Newman again a few months later and again asked for a transfer. Newman responded that Noska needed to complete the PIP first. *Id.* at 72.

The PIP referred to by Newman was initiated after Noska's performance review in 1995. In that review, Nelson rated Noska's performance as 2 (performance marginally meets expectations). Cheeseboro Affidavit, Exhibit 5. Each area of his responsibility was assessed in the review and comments were made on timeliness of work, a lack of effort expended in mastering areas of responsibility, and a lack of leadership in projects. *Id.* In those areas where work was completed in a timely fashion, Nelson rated Noska at 3 (performance fully meets expectations). *Id.* Nelson's summary states:

In the summary of his last year's performance appraisal, Tom's manager wrote "As a senior member of the group, Tom needs to rely less on others while showing more team initiative and leadership." The requested changes have not been evident this year, although Tom and his manager have met numerous times to discuss these behaviors. As a Senior Analyst, Tom is expected to demonstrate initiative, act independently, take full ownership of the projects/activities to which he is assigned, and maintain an output level consistent with his position: he has not demonstrated these consistently throughout the year. Tom has not met the expectations established during his last review.

Id.

When going over the performance review in December, 1995, Noska asserted to Nelson that he thought that she was discriminating against him. Cheeseboro Affidavit, Exhibit 8 (note dated 12/20). Noska prepared comments on the performance review that were critical of Nelson and asserted that she was responsible for any shortcomings in his performance. Celebreeze Affidavit, Exhibit 2 (Employee Comments dated 12/27/95). There was no mention of discrimination in the Employee Comments. Noska complained to the Human Resources Department on December 29, 1995. Celebreeze Affidavit, Exhibit 2, Deposition Exhibit 24. Noska expressed his desire for a transfer but did not complain of discrimination.

Nelson spoke to Newman on January 2, 1996, and Newman related his discussion with Noska. Both Nelson and Newman agreed that Noska should complete a PIP. Cheeseboro Affidavit, Exhibit 8 (note dated 1/2); Celebreeze Affidavit, Exhibit 2, at 141. On January 5, 1996, Noska and Nelson discussed the PIP and agreed that an outside reviewer would be a good idea. Celebreeze Affidavit, Exhibit 2, Deposition Exhibit 7. Due to various reasons, including the death of Noska's father-in-law, the PIP was not signed.

On January 31, 1996, Noska gave Nelson a letter expressly alleging age discrimination by Nelson. Celebreeze Affidavit, Exhibit 2, Deposition Exhibit 7; Cheeseboro Affidavit, Exhibit 9. David Moran in the Human Resources Department was assigned to investigate the allegation. Moran interviewed Noska to determine the basis of his complaint. Cheeseboro Affidavit, Exhibit 18, at 24. Noska expressed uncertainty as to why there was age discrimination and maintained that he was having a personality conflict with Nelson. *Id.* Moran interviewed five employees who appeared to be over forty years of age and Nelson regarding the allegations. None of the employees expressed any opinion that Nelson was discriminating against anyone she supervised. Although he was not referred to by Moran, two employees expressed the opinion that Noska was not performing up to the level that a Senior Systems Analyst should achieve. Cheeseboro Affidavit, Exhibit 11, Deposition Exhibits 5 and 7.

Moran concluded that there was no age discrimination problem and informed Noska that the PIP needed to be signed to work through any problems that existed. Cheeseboro Affidavit, Exhibit 18, at 78-82. Noska signed the PIP on February 20, 1996 and added a note which stated "I enjoy working for Pillsbury and wish to continue my employment. Therefore I am signing this document." Cheeseboro Affidavit, Exhibit 13.

On March 1, 1996, Noska wrote to Eliche Wilson of the Human Resources Department of Pillsbury and maintained he was constructively discharged due to age discrimination and retaliation which made the work environment intolerable. Celebreeze Affidavit, Exhibit 2, Deposition Exhibit 46. This matter ensued.

The Human Rights Act specifies that, except under limited circumstances, it is an unfair employment practice for an employer to discharge an employee because of age or otherwise discriminate against an employee because of age with respect to "hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363.03, subd. 1(2) (1992).

Minnesota courts have often relied upon federal case law developed in discrimination cases arising under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act in interpreting the Human Rights Act. Relevant Minnesota case law establishes that plaintiffs in employment discrimination claims arising under the Human Rights Act may prove their case either by presenting direct evidence of discriminatory intent or by presenting circumstantial evidence in accordance with the analysis first set out by the United States Supreme Court in **McDonnell Douglas Corp. v. Green**, 411 U.S. 792, 802-03 (1973). **Feges v. Perkins Restaurants, Inc.**, 483 N.W.2d 701, 710 and n. 4 (Minn. 1992); **Sigurdson v. Isanti County**, 386 N.W.2d 715, 719 (Minn. 1986); **Danz v. Jones**, 263 N.W.2d 395, 399 (Minn. 1978).

The approach set forth in **McDonnell Douglas** consists of a three-part analysis which first requires the complainant to establish a *prima facie* case of disparate treatment based upon a statutorily-prohibited discriminatory factor. Once a *prima facie* case is established, a presumption arises that the respondent unlawfully discriminated against the complainant. The burden of producing evidence then shifts to the

respondent, who is required to articulate a legitimate, nondiscriminatory reason for its treatment of the complainant. If the respondent establishes a legitimate, nondiscriminatory reason, the burden of production shifts back to the complainant to demonstrate that the respondent's claimed reasons were pretextual. **McDonnell Douglas**, 411 U.S. at 802-03; see also **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248 (1981); **Furnco Construction Corp. v. Waters**, 438 U.S. 567 (1978); **Anderson v. Hunter, Keith, Marshall & Co.**, 417 N.W.2d 619, 623 (Minn. 1989); **Hubbard v. United Press International Inc.**, 330 N.W.2d 428 (Minn. 1983).

Indirect proof of discrimination is permissible to show pretext, since "an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." **Haglof v. Northwest Rehabilitation Inc.**, 910 F.2d 492, 494 (8th Cir. 1990)(quoting **MacDissi v. Valmont Industries Inc.**, 856 F.2d 1054, 1059 (8th Cir. 1988)). The burden of proof remains at all times with the complainant. **Fisher Nut Co. v. Lewis ex rel. Garcia**, 320 N.W.2d 731 (Minn. 1982); **Lamb v. Village of Bagley**, 310 N.W.2d 508, 510 (Minn. 1981).

Minnesota courts have adopted and applied the three-part **McDonnell Douglas** analysis in deciding summary judgment motions involving claims alleging disparate treatment in violation of the Human Rights Act. **Albertson v. FMC Corp.**, 437 N.W.2d 113, 115 (Minn. App. 1989), citing **Sigurdson v. Isanti County**, 386 N.W.2d 715, 719-22 (Minn. 1986); see also, **Rademacher v. FMC Corp.**, 431 N.W.2d 879, 882 (Minn. App. 1988); **Shea v. Hanna Mining Co.**, 397 N.W.2d 362, 368 (Minn. App. 1986). The U.S. Court of Appeals for the Eighth Circuit has cautioned that "[s]ummary judgments should be sparingly used [in cases alleging employment discrimination] and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion ... All the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the non-moving party." **Johnson v. Minnesota Historical Society**, 931 F.2d 1239, 1244 (8th Cir. 1991) (relying upon **Hillebrand v. M-Tron Industries Inc.**, 827 F.2d 363, 364 (8th Cir. 1987), *cert. den.*, 488 U.S. 1004 (1989); and **Holley v. Sanyo Manufacturing, Inc.**, 771 F.2d 1161, 1164 (8th Cir. 1985).

The Minnesota Supreme Court has tempered the standard set forth in **Johnson v. Minnesota Historical Society** as to summary judgment in discrimination cases. The Minnesota Supreme Court and stated:

We take this opportunity to express our disapproval of the court of appeals' sweeping statement that summary disposition is generally inappropriate in discrimination cases. **Johnson [v. Canadian Pacific Ltd.]**, 522 N.W.2d 391. That is not the law in Minnesota.

Dietrich v. Canadian Pacific Railroad, Ltd., 536 N.W.2d 319, 327 (Minn. 1995)(footnote 9).

The elements of a *prima facie* case of discrimination vary depending upon the type of discrimination alleged, and must be tailored to fit the particular circumstances.

Ward v. Employee Development Corp., 516 N.W.2d 198, 201 (Minn. App. 1994). The Complainant's claims in the present case fall into the primary category of adverse action taken against an older employee on the basis of age. In order to demonstrate a *prima facie* case of age discrimination in suspension or termination, the Complainant must show he is member of a protected class, he is qualified for the position, an adverse action was taken against him, and that younger employees did not suffer from such adverse action. **Ward**, 516 N.W.2d, at 201.

Applying the standards for discrimination cases and taking the evidence in a light most favorable to the nonmoving party, the Administrative Law Judge concludes that Noska has demonstrated a *prima facie* case of age discrimination. Noska was the oldest employee in the group. Based on his last performance review, Noska was at least minimally qualified for his position. Placement on a PIP is certainly adverse employment action, since failure to meet the specific goals in the PIP could result in termination. Noska has alleged that the only other employee to be put on a PIP by this supervisor was nearly Noska's age. The facts advanced by Complainant, if proven at the hearing in this matter, are sufficient to demonstrate a *prima facie* case of age discrimination.

The employer can avoid summary disposition once a *prima facie* case is established by showing a legitimate reason existed for the employment action. **Shea v. Hanna Min. Co.**, 397 N.W.2d 362, 369 (Minn.App. 1986). On an employer's motion for summary judgment, the employee's burden in an age discrimination case is to show "a triable issue as to pretext" by raising an inference that "age made a difference." **Nobler v. Beth Israel Medical Center**, 702 F.Supp. 1023, 1028 (S.D.N.Y. 1988) (citing **Hagelthorn v. Kennecott Corp.**, 710 F.2d 76, 82 (2nd Cir. 1983)).

Demonstrating a genuine issue of material fact regarding pretext requires some showing that the claimed reason for the employment action is not worthy of credence. The Eighth Circuit analyzed a charging party's burden on summary judgment as follows:

And, as the Supreme Court recently held in **Hicks**, proof that the defendant's articulated explanation is false or incorrect does not, standing alone, entitle the plaintiff to judgment; instead, the showing must be that the explanation is a pretext for discrimination. See **Hicks**, 509 U.S. at --, 113 S.Ct. at 2752; see also, **Krenik**, 47 F.3d at 958 (to survive summary judgment, plaintiff must provide evidence that defendant's proffered explanation is both incorrect and that discrimination is the true explanation). This does not necessarily require the plaintiff to submit specific additional evidence, for, in some cases, the evidence establishing the *prima facie* case, in conjunction with disproof of the explanation proffered by the defendant, may be sufficient to persuade the fact finder as to the ultimate issue of intentional discrimination, *id.* at --, 113 S.Ct. at 2749, but it does recognize that the burden of persuasion as to this question remains with the plaintiff at all times and that this burden cannot be carried merely by showing the defendant's explanation to be incorrect, contrived, or deceitful. See **Kobrin**, 34 F.3d at 703 (rejection of

defendant's proffered explanations may permit, though does not require, a finding of intentional discrimination); **Nelson v. Boatmen's Bancshares**, 26 F.3d 796, 801 (8th Cir.1994) ("obviously contrived" explanation by employer allows, but does not necessarily require, the fact finder to infer intentional discrimination).

Hutson v. McDonnell-Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995).

Respondent has advanced legitimate, nondiscriminatory reasons for the actions Nelson took toward Noska. Noska's job performance was characterized as sub-standard once cross-training was initiated. Untimeliness of tasks to be performed is repeatedly mentioned in Nelson's discussions with Noska. On the most significant points, mastery of the MASCOT software package and complying with the deadlines set for completing work, Noska has expressed no disagreement with the facts. He did not become proficient with the MASCOT software and several matters were not addressed within the deadlines set by Nelson.

Noska suggests that Nelson's considering him for a PIP in February, 1995 is evidence of pretext, since a performance rating of 3 does not warrant a PIP without gross misconduct. Cheeseboro Affidavit, Exhibit 18, at 22. No PIP was imposed at that time. Further, the performance review and Noska's response to that review indicates that there were significant problems arising in Noska's approach to his responsibilities, as perceived by Nelson. The consideration of a PIP in February, 1995 does not support an inference of pretext.

Some of the tasks assigned to Complainant are asserted to be of a skill level below that of a Senior Systems Analyst. This is cited by Noska as evidence of discrimination. Nelson referred to focused tasks in the software packages Noska was learning as a way of demonstrating ability and building confidence. Cheeseboro Affidavit, Exhibit 4. The assignment of such tasks is not evidence of discrimination or pretext, where, as here, there are objective reasons for those assignments.

Complainant attempts to rebut Respondent's asserted legitimate reason with the claim that the problems he experienced arose from lack of documentation, lack of support, and an unreasonable attitude on the part of his supervisor. The only evidence in the record on this motion is that such documentation, support, and attitude were consistent for all persons supervised by Nelson and that only Noska was failing to overcome those problems. Noska could not identify any fact that suggested Nelson was discriminating on the basis of age. Celebreeze Affidavit, Exhibit 1, at 104 and 119.

Complainant asserts that the information obtained by Moran in his investigation of the discrimination charge cannot be used to refute any claim of age discrimination since Moran did not ask about Noska expressly in the interviews, and Moran requested that each interview be kept confidential. The manner in which Moran conducted his investigation is consistent with a good faith effort to find out what was going on in the group. Two coworkers other than Nelson expressly identified Noska as not performing up to the level required in his position. Cheeseboro Affidavit, Exhibit 11, Deposition

Exhibits 5 and 7. Noska's own deposition acknowledges that he was not mastering the software he was assigned to. The only inference available from this evidence is that Noska was in fact performing below the standards of his position as of February, 1996. Performance below standards in a position is cause for imposing a PIP on the employee, to restore performance to an acceptable level.

Without evidence to contradict the assessments of his supervisor and coworkers, Complainant has not introduced any evidence to bring the propriety of Pillsbury's actions into question. Complainant has not shown that any genuine issue of fact remains as to whether the stated reason for placing him on a PIP is mere pretext for illegal discrimination. The record is devoid of any evidence that his age made a difference with respect to any term of his employment.

Regarding Noska's claim of retaliation, there has been no clear evidence that any allegation of unlawful discrimination was made prior to January 31, 1996. Upon making the claim of illegal discrimination, Pillsbury initiated an investigation. All of the employment actions complained of as discrimination occurred before the claim of unlawful discrimination was made by Noska. Therefore, no causal connection can be drawn to substantiate a charge of retaliation.

Respondent has requested summary disposition on the constructive discharge claim, asserting as a matter of law that the conditions Complainant experienced are not sufficiently adverse to render continued employment intolerable. The only tangible event identified as supporting the constructive discharge claim is that the PIP was "set-up for me [Noska] to fail . . ." Celebreeze Affidavit, Exhibit 1, at 133. The PIP was prepared with input from several persons other than Nelson. A second manager was assigned to review progress on the PIP. None of the tasks or standards to be met in the PIP have been identified as impossible or unduly burdensome. Complainant has raised no genuine issue of fact that supports a claim of constructive discharge.

With no genuine issue of material fact remaining for hearing, Respondent has shown that it is entitled to summary disposition in its favor.

S.M.M.